Beech Branch Coal Company *and* Donald Pittman.
Case 9-CA-15425

March 12, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 29, 1981, Administrative Law Judge J. Lee Benice issued the attached Decision in this proceeding. Thereafter, the General Counsel filed limited exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We find merit in the General Counsel's limited exceptions to the Administrative Law Judge's failure to order that Respondent offer discriminatees Larry Caudill, Harrad Clevins, Robert Davis, Curtis Dean, Sr., Cecil Lamb, Henry Quesenberry, and Ernest Vickers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed. While the record discloses, as the Administrative Law Judge found, that Respondent presently is not engaged in the business involved herein, there is always the possibility that Respondent may decide to resume such operations. Accordingly, we shall order the conditional reinstatement of these employees premised on the resumption of the same or substantially similar business operations. *Carpet City Mechanical Company, Inc., et al.*, 244 NLRB 1031 (1979).

Further, in his recommended Order, the Administrative Law Judge inadvertently failed to include any injunctive cease-and-desist language. We have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that a narrow remedial order is appropriate here. Accordingly, we shall modify the recommended Order so as to provide for the narrow injunctive language.

[1] In the absence of exceptions, we adopt *pro forma* the Administrative Law Judge's findings of 8(a)(1) violation and his recommended dismissal of the complaint allegations concerning Pittman's discharge. In doing so, we do not necessarily agree with his discussion of the grounds upon which the Board might rely in finding a supervisor's discharge violated the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Beech Branch Coal Company, Lewellyn, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

"(a) Discharging or otherwise discriminating against employees in regard to their hire or tenure of employment or any term or conditions of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

"(b) In the like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Insert the following as paragraph 2(a) and reletter succeeding paragraphs accordingly:

"(a) In any event that Respondent should resume the same or substantially similar business operations as engaged in by Beech Branch Coal Company, at Lewellyn, Kentucky, it shall offer Larry Caudill, Harrad Clevins, Robert Davis, Curtis Dean, Sr., Cecil Lamb, Henry Quesenberry, and Ernest Vickers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees because they have engaged in concerted activities which are protected under the National Labor Relations Act, including the right to protest collectively and discuss changes in working conditions, hours of service, and rates of pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

In the event that we should resume the same or substantially similar business operations as engaged in by Beech Branch Coal Company at Lewellyn, Kentucky, WE WILL offer Harry Caudill, Harrad Clevins, Robert Davis, Curtis Dean, Sr., Cecil Lamb, Henry Quesenberry, and Ernest Vickers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make Harry Quesenberry, Cecil Lamb, Curtis Dean, Sr., Harrad Clevins, Larry Caudill, Robert Davis, and Ernest Vickers whole for any loss of earnings they may have suffered as a result of our discrimination against them, plus interest.

BEECH BRANCH COAL COMPANY

DECISION

STATEMENT OF THE CASE

J. LEE BENICE, Administrative Law Judge: The charge in this case was filed on June 9, 1980, by Donald Pittman, an individual. On July 22, 1980, the complaint issued alleging that Respondent had discharged Pittman and eight other employees, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, because they had engaged in protected concerted activity. Respondent, in its answer, denies that it has committed any unfair labor practices.

The case presents these issues: Whether the employees were actually discharged by Respondent; and, if so, whether Pittman, although a supervisor, is nevertheless entitled to protection under the Act.

A hearing was held before me in Harlan, Kentucky, on March 12, 1981. Briefs have been filed by the General Counsel and Respondent.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is no longer in business, but at the time of the incident alleged in the complaint it was engaged in the mining and sale of coal from facilities in Kentucky. During a representative 1-year period, it purchased and received goods and materials valued in excess of $50,000 shipped directly to its Kentucky facilities from points outside Kentucky. I find that, at the time of the incident alleged in the complaint, Respondent was an employer engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In May 1980, Respondent was operating a coal mine at Evarts, Kentucky, which had not been profitable. Respondent's testimony attributes the unprofitability mainly to the inefficiency of the first-shift foreman, Donald Pittman, and his crew. Pittman blames the physical problems encountered in the mine. Whatever the cause, Respondent decided to improve profitability by exacting longer hours from the employees at no increase in compensation.

On Friday, May 9, Respondent announced that, effective Monday, May 12, the working hours on the first shift would be changed. Instead of working from 6 a.m. to 2 p.m., with a paid lunch break, the men, for the same pay, would work from 6:30 a.m., to 3 p.m., with a half-hour unpaid lunch period. As the employees interpreted this, it meant working an extra half-hour without pay.

On May 12, just before the men entered the mine, Bill Shuler, the mine superintendent, told them again about the new hours and stated that anyone who did not like could "hit the road"; i.e., could resign. One did quit. Walter David Gross left in response to these remarks, and thus did not enter the mine that day.

The remaining employees discussed the new situation while they were on the way into the mine and whenever they gathered together in the mine. At lunch, at 10:30 a.m., they all ate together, discussed the matter, and decided to leave the mine at once to discuss the problem with Charles Eldridge, the vice president of the Company. Pittman had said that if they decided to leave, he would go out with them. He did so and, when they met with Eldrige and Shuler shortly afterward, Pittman became the spokesman for the employees.

The discussion began out of doors and the three men soon adjourned to the office. Nothing was resolved. Shuler made it plain that he did not feel that he and Pittman should continue to work at the same mine. Eldridge was unable to decide what to do. He said that he would consult with the other family members of his who were involved with him in various coal mining ventures, and would give his answer to Pittman at 3 p.m. It was very clearly understood that Pittman would then relay word to his crew.

Eldridge did not call that afternoon, so Pittman called Eldridge at home at at 8 p.m. According to Pittman, Eldridge stated that he would replace the men, including Pittman, with a new crew. According to Eldridge, he merely stated that Pittman was not leaving him much choice, whereupon Pittman, leaping to the conclusion that he and his crew had been fired, said, "Well, if that's the way you feel about it," and slammed the phone down.

Pittman then told the crew members that they were being replaced by another crew and should meet him at the unemployment office the next morning.

I credit Pittman's testimony. He was more forthcoming than Eldridge and was less inconsistent on critical matters, and his story accords well with Eldridge's admitted frustration over what he considered to be an inef-

ficient crew that was causing him to lose money at the mine. But even under Eldridge's version of the telephone conversation, Eldridge, knowing that Pittman, reacting in the apparent belief that they had all been fired, would pass the word to his men, was content to leave Pittman apparently believing that they had been fired, and was content to send no different word to Pittman or to any of the others. He merely watched the mine entrance each morning for the rest of the week to see if anyone came to work. Each day, as no one turned up, and as it became increasingly probable that the men had been led to believe that they had all been fired, he did nothing to alter this belief.

On Monday, May 19, the beginnings of a replacement crew took over the shift.[1] Significantly, Eldridge did not contest the unemployment compensation claims of any of the men, except for Pittman. Gross, who had walked off the job on May 12, eventually returned, and was given a job at another of Eldridge's mines.

B. *Concluding Findings*

Respondent contends that Pittman, by terminating the telephone conversation with Eldridge and refusing to discuss the situation further, had voluntarily quit his employment and from that point forward was no longer a supervisor of the Company. Thus, any actions that he may have taken to seek out employees and notify them that they were laid off or fired were done entirely as an individual, and not as agent of the Company. However, I have found that Eldridge knowingly passed the word to the men, through Pittman, that they had been fired; and even under Eldridge's own account, his act was not different, in any significant way, from a face-to-face firing or from the use of a fully tenture supervisor to announce formal discharges. In his own version of the facts, he was content to let Pittman be the instrumentality by which the employees were told that they had been fired, and was content to do nothing thereafter to alter the impression that they received.

I conclude that the employees were fired, and that the obvious reason for the firing was their having engaged in the protected concerted activity of jointly protesting a change in the their work hours and in their effective hourly rate of compensation. Such action by the seven nonsupervisory employees[2] was clearly protected concerted activity, and their discharges clearly violated Section 8(a)(1) by interfering with their exercise of these Section 7 rights. On the other hand, I conclude that the discharge of Supervisor Donald Pittman did not violate the Act.

The Board has found that an employer violates Section 8(a)(1) when it discharges a supervisor for refusing to commit unfair labor practices[3] or for protecting employees from such practices;[4] for testifying before the Board or otherwise participating in a Board proceeding;[5] or where the discharge of the supervisor was used as a device for reaching and punishing employees who would be protected by law from more direct methods.[6] The Board has even, on occasion, ordered reinstatement of supervisors who were fired as examples to the employees in order to discourage them from exercising their Section 7 rights.[7] However, the Board has found that the Act does not protect an supervisor discharged merely for siding with the employees in their grievance against the company, whether the dispute is over union activity[8] or is purely economic.[9]

I find that the evidence does not support the General Counsel's contention that Pittman's discharge was used to make a point to any remaining employees and thereby to eliminate dissension. I find that it was far more likely that it was Pittman's siding with the employees against management over the new work hours imposed by management which led to his discharge.

III. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Because Respondent is not presently actively engaged in business, it will not be required to post a notice of the action taken here. However, some of its former employees may now be working for an affiliated Eldridge enterprise, or may seek employment there in the future; or Respondent Company might resume operations. Therefore, I shall recommend that Respondent be required to provide signed copies of a notice, and the names and addresses of former employees, so that notices can be mailed to all those who where employed by Respondent at the time of the discharges.

As I have found that Respondent unlawfully discharged seven nonsupervisory employees, but has since gone out of business and is therefore unable to offer them reinstatement, I shall recommend that Respondent be ordered to make the employees whole for any loss of earnings they may have suffered as a result of their discharges, by payment to them of the amount they normally would have earned from the date of their discharge until the date Respondent went out of business, less net earnings, to which shall be added interest, to be comput-

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[1] At this point, replacements were put to work as quickly as they could be hired.

[2] Employer Walter David Gross is not included in this list because he voluntarily resigned before the violation of Sec. 8(a)(1) occurred. Contrary to the assertion of the General Counsel, I conclude that the doctrine of *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975), does not protect an employee, acting alone, who voluntarily terminates his employment rather than accept a change in working hours.

[3] See, e.g., *Miami Coca Cola Bottling Company d/b/a Key West Coca Bottling Company*, 140 NLRB 1359 (1963), enforcement denied on other grounds 341 F.2d 524 (5th Cir. 1965); *Russell Stover Candies, Inc.*, 223 NLRB 592 (1976), enfd. 551 F.2d 204 (8th Cir. 1977).

[4] See, e.g., *Buddies Super Markets*, 223 NLRB 950 (1976), enforcement denied 550 F.2d 39 (5th Cir. 1977); *VADA of Oklahoma, Inc.*, 216 NLRB 750 (1975); *Donelson Packing Co., Inc., and Riegel Provision Company*, 220 NLRB 1043 (1975).

[5] See, e.g., *Oil City Brass Works*, 147 NLRB 627 (1964), enfd. 357 F.2d 466 (5th Cir. 1966); *Better Monkey Grip Company*, 115 NLRB 1170 (1956), enfd. 243 F.2d 836 (5th Cir. 1957), cert. denied 355 U.S. 864.

[6] *Pioneer Drilling Co., Inc.*, 162 NLRB 918 (1967), enfd. in pertinent part 391 F.2d 961 (10th Cir. 1968).

[7] See, e.g., *Sheraton Puerto Rico Corp. d/b/a Puerto Rico Sheraton Hotel*, 248 NLRB 867 (1980).

[8] *Sibilio's Golden Grill, Inc.*, 227 NLRB 1688 (1977).

[9] *Long Beach Youth Center, Inc., a/k/a Long Beach Youth Home (formerly Trailbacks, Inc.*, 230 NLRB 648 (1977).

ed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging the seven nonsupervisory employees named in the Order, *infra*, for engaging in protected concerted activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

3. By discharging a supervisory employee, Donald Pittman, Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Beech Branch Coal Company, Lewellyn, Kentucky, its agents, successors, and assigns, shall:

1. Cease and desist from discharging or otherwise discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make the following employees whole for any loss of earnings they may have suffered as a result of their discharges, in the manner set forth in the section of this Decision entitled "The Remedy": Henry Quesenberry, Cecil Lamb, Curtis Dean, Sr., Harrad Clevins, Larry Caudill, Robert Davis, and Ernest Vickers.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant and necessary to a determination of compliance with paragraph (a), above.

(c) Furnish to the Regional Director for Region 9 the names and most recent addresses in its possession of all employees employed by Respondent on May 12, 1980, and those employed currently, if any, and sign a sufficient number of copies of the attached notice marked "Appendix"[11] for mailing by the Regional Director to each employee.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply with the is Order.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."